87-1707

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

FREDERICK C. STAUBER, Petitioner,

v.

RICHARD A. CLINE, FRED C. SHARPER,
and RAY DUGAN, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH N. BARCOTT
3900 Arctic Blvd., Suite 201
Anchorage, AK 99503
(907) 563-0303
Counsel for Petitioner

Michael R. Spaan
United States Attorney
Federal Bldg. & U.S. Cthouse
701 C Street, Room C-252
Anchorage, Alaska 99513
(907) 271-5071
Counsel for Respondents

QUESTIONS PRESENTED

Under Feres v. United States, 340 U.S. 135 (1950) "and its progeny," tort actions for injuries that arise out of or are in the course of activity incident to service are prohibited.

Individuals employed as National Guard technicians have federal civilian employee status under the National Guard Technician's Act of 1968 (32 U.S.C. §709); they are assigned civilian wage grades, receive civilian fringe benefits, and may negotiate civilian labor agreements; they possess a civilian/ military status; they must bè a member of the National Guard to be eligible for such employment. See, e.g., Sebra v. Neville, 801 F.2d 1135, 1139-41 (9th Cir. 1986).

The questions presented are:

1. Are technician's duties "in the course of activity incident to service" such that Feres prohibits a state court action between individual civilian technicians based on common law intentional torts?

2. If so, to what extent can "off-base, after-hours harassment" be considered "merely an extension of on-base events to which intramilitary immunity properly applies"? Stauber v. Cline et al., 837 F.2d 395, 400 (9th Cir. 1988).

3. Would an examination of the relationship between on and off base events result in an impermissible intrusion upon military matters?

4. Should Feres be overruled, or at least expressly limited to allegations of negligence on the part of members of the military?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Frederick C. Stauber, and the Respondents Richard A. Cline, Fred C. Sharper, and Ray Dugan. The State of Alaska, Department of Military and Veteran's Affairs, and State Review and Appeals Board were separate defendants in the district court but were dismissed from the action prior to trial on their motion for summary judgment and had no subsequent interest in the litigation. Accordingly, said defendants are not named as parties herein.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

LIST OF PARTIES.....iii

TABLE OF CONTENTS.....iv

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....1

JURISDICTION.....2

STATUTE INVOLVED.....3

STATEMENT OF THE CASE.....7

REASONS FOR GRANTING THE WRIT.....15

I. Confusion and conflict in the circuit courts about the applicability of Feres when plaintiff is a civilian federal employee serving pursuant to the National Guard Technician's Act.....18

II. It is important for this Court to determine how far on-duty, on-base activity incident to military service extends.....23

III. Importance and broad application of the principles.....26

IV. Ninth Circuit Error.....26

CONCLUSION.....31

APPENDIX

Opinion of court of appeals.....1a
Order of district court.....14a
Judgment pursuant to jury verdict..25a
Affidavit of Stauber.....27a

TABLE OF AUTHORITIES

Cases: Page

Bois v. Marsh,
801 F.2d 462 (D.C. Cir 1986).....21

Bollen v. National Guard Bureau,
449 F.Supp. 343 (W.D. Pa. 1978).....21

Brown v. United States,
739 F.2d 362 (8th Cir. 1984)
.....19, 24, 25, 29

Bush v. Lucas,
462 U.S. 367 (1983).....22

Chappell v. Wallace,
462 U.S. 296 (1983).....21

Feres v. United States,
340 U.S. 135 (1950).....i, ii, 2, 14, 15, 16, 17, 18, 23, 26, 27, 28

Goldman v. Weinberger,
475 U.S. 503 (1986) 28

Johnson v. Orr,
780 F.2d 386 (3rd Cir. 1986)....21, 22

Martelon v. Temple,
747 F.2d 1348 (10th Cir. 1984)
.....16, 20, 22

Millang v. United States,
817 F.2d 533 (9th Cir. 1987).....25

NeSmith v. Fulton,
615 F.2d 196 (5th Cir. 1980).....21

Table of Authorities, cont'd.

Page

Rowe v. Tennessee,
609 F.2d 259 (6th Cir. 1979).....21

Schultz v. Wellman,
717 F.2d 301 (6th Cir. 1983).....21

Sebra v. Neville,
801 F.2d 1135 (9th Cir. 1986).....i

Stauber v. Cline et al.,
837 F.2d 395 (9th Cir. 1988).....ii

Stencel Aero Engineering Corp. v. United States,
431 U.S. 666 (1977).....27

Syrek v. Pennsylvania Air National Guard,
371 F.Supp. 1349 (W.D. Pa. 1974)....21

Trerice v. Pederson,
769 F.2d 1398 (9th Cir. 1985).....21

United States v. Johnson,
107 S.Ct. 2063 (1987)...18, 19, 26, 28

United States v. Shearer,
473 U.S. 52 (1985).....24-25

Miscellaneous:

Note, Intramilitary Immunity and Constitutional Torts, 80 Mich. L. Rev. 312 (1981) 22

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

FREDERICK C. STAUBER, Petitioner,

v.

RICHARD A. CLINE, FRED C. SHARPER,

and RAY DUGAN, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner Frederick C. Stauber respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on January 20, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 837 F.2d 395, and is reprinted in the appendix hereto, p. 1a, infra.

The September 25, 1986 order of the United States District Court for the District of Alaska (Holland, D.J.), setting aside the jury verdict and dismissing plaintiff's complaint has not been reported. It is reprinted in the appendix hereto, p. 14a, infra.

The February 12, 1986 judgment entered pursuant to jury verdict is reprinted in the appendix hereto, p. 25a, infra.

JURISDICTION

Respondents removed this case from the Superior Court for the State of Alaska, Third Judicial District at Anchorage, to the United States District Court for the District of Alaska under 28 U.S.C. 1441(a) and 1442(a)(1). After a jury awarded petitioner $106,000.00 respondents raised the issue of Feres v. United States immunity for the first time, and the district court set aside the judgment and dismissed

petitioner's action for lack of subject matter jurisdiction.

On January 20, 1988, the Ninth Circuit affirmed respondents' immunity from suit, and dismissal of petitioner's action for lack of jurisdiction. No petition for rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

32 U.S.C. §709. Technicians: Employment, Use, Status

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians in

(1) the administration and training of the National Guard; and

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

(b) Except as prescribed by the Secretary concerned, a technician employed under subsection (a) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

(c) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title [32 USCS § 314], to employ and administer the technicians authorized by this section.

(d) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed therein is required under subsection (b) to be a member of the National Guard.

(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned

(1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned;

(2) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who fails to meet the military security standards established by the Secretary concerned for a member of a reserve component of the armed force under his jurisdiction may be separated from his employment as a technician and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(4) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(5) A right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned; and

(6) a technician shall be notified in writing of the termination of his employment as a technician and such notification shall be given at least thirty days prior to the termination date of such employment.

(f) Sections 2108, 3502, 7511, and 7512 of title 5 [5 USCS §§2108, 3502, 7511, 7512] do not apply to any person employed under this section.

(g) (1) Notwithstanding sections 5544(a) and 6101(a) of title 5 [5 USCS §§5544(a), 6101(a)] or any other provision of law, the Secretary concerned may, in the case of technicians assigned to perform operational duties at air defense sites

(A) prescribe the hours of duties;

(B) fix the rates of basic compensation; and

(c) fix the rates of additional compensation;

to reflect unusual tours of duty, irregular additional duty, and work on days that are ordinarily nonworkdays. Additional compensation under this subsection may be fixed on an annual basis and is determined as an appropriate percentage, not in excess of 12 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10 of the General Schedule under section 5332 of title 5 [5 USCS § 5332].

(2) Notwithstanding sections 5544(a) and 6101(a) of title 5 [5 USCS §§ 5544(a), 6101(a)] or any other provision of law, the Secretary concerned may, for technicians other than those described in clause (1) of this subsection, prescribe the hours of duty for technicians. Notwithstanding sections 5542 and 5543 of title 5 [5 USCS §§ 5542, 5543] or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

(h) In no event shall the number of technicians employed under this section at any one time exceed 53,100.

STATEMENT OF THE CASE

On December 5, 1983, plaintiff initiated this action by filing a complaint in the Alaska Superior Court, Third Judicial District at Anchorage, against the three individual defendants, Richard A. Cline, Fred C. Sharper, and Ray Dugan (hereinafter "individual defendants") alleging intentional infliction of emotional distress, libel, slander, injurious falsehood, and breach of contract, committed both in their capacity as civilian federal employees under the National Guard Technicians Act of 1968 (hereinafter "Act"), 32 U.S.C. 709, et seq., and during off duty hours. See Clerk's record, docket #1. All parties were technician mechanics. Defendant Cline was plaintiff's immediate supervisor. Defendants have acknowledged they were civilian employees of the Alaska Army National Guard. Clerk's record, docket #10, page 2. The Act requires membership

in the National Guard as a prerequisite to the civilian employment. Subsequently, the actions complained of were more particularly described in a March 14, 1984 affidavit of plaintiff. See Clerk's record, docket #8; Appendix, p. 27a, infra. Because all parties were also members of the National Guard, and because some of the acts complained of were committed on a military installation, the United States Attorney entered his appearance on behalf of all three defendants and removed the action to the United States District Court for the District of Alaska on December 15, 1983. Case No. A83-613. On March 2, 1984, defendants filed a motion to dismiss the action for failure of plaintiff to state a claim upon which relief could be granted. Clerk's record, docket #6. On March 16, 1984, plaintiff filed a motion for remand of the action to state court and also a

motion to be permitted to amend his complaint to cure any deficiencies. Clerk's record, docket #8.

While maintaining this action against the individual defendants for what plaintiff perceived were purely civil torts, he was also utilizing the administrative appeal provision available to him under the Act to appeal a decision of the State Adjutant General to terminate his employment as a National Guard technician based on poor performance appraisals (issued by defendant Cline). The State Review and Appeals Board heard plaintiff's appeal on May 1 and 2, 1984, and affirmed the Adjutant General's decision on May 3, 1984. On May 4, 1984, the Adjutant General issued his final decision to adopt the decision of the appeal board, and terminated plaintiff's employment as a technician. On June 1, 1984, plaintiff appealed that decision to the

Alaska Superior Court as an administrative appeal naming as defendants the State of Alaska, Department of Military and Veteran's Affairs, Office of the Adjutant General; the State Review and Appeals Board; and Richard A. Cline (hereinafter "state defendants").

On August 10, 1984, the United States District Court denied in part the individual defendants' March 2, 1984 motion to dismiss, denied Stauber's motion for remand, albeit finding some evidence that defendants may have been on a frolic of their own, and gave Stauber fifteen days to amend his complaint to amplify and particularize his allegations. Clerk's record, docket #14. Stauber filed his amended complaint and renewed his motion for remand on August 15, 1984 (denied by order of January 11, 1985). Clerk's record, docket #16, 17. "In its pretrial jurisdictional rulings,

the district court found that the defendants were federal officers acting under color of their authority." 837 F.2d 395, 397 n.4.

On September 27, 1984, Stauber filed a motion in state court to dismiss his June 1, 1984 administrative appeal (granted by order of October 10, 1984), and on September 28, 1984, filed a new action against the state defendants in federal court (A84-421) alleging violations of 42 U.S.C. 1983 and 1985, and military regulations. See, e.g., Clerk's record, docket #28. On February 15, 1985, case No. A83-613 against the individual defendants, and A84-421 against the state defendants were consolidated pursuant to stipulation. Clerk's record, docket #28.

On December 16, 1985, the individual defendants and state defendants filed motions for summary judgment. Clerk's

record, docket #43, 44. On January 14, 1986, the state defendants' motion was granted (removing them from the action) and the individual defendants' motion partially granted. Clerk's record, docket #52, 53.

In February 1986, a jury trial was held on the remaining issues of intentional infliction of emotional distress and slander. The jury returned a verdict in Stauber's favor (Clerk's record, docket #75), and on February 12, 1986 judgment was entered (1) against all three defendants in the amount of $40,000.00 for intentional infliction of emotional distress, (2) against defendant Cline in the amount of $36,000.00 for defamation, and (3) against all three defendants in the amount of $30,000.00 for punitive damages. Clerk's record, docket #76. Appendix p. 25a.

In finding liability for intentional infliction of emotional distress, the jury found that all three defendants acted with

extreme and outrageous conduct defined as "conduct which goes beyond all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized community. It is conduct which would cause an average member of the community to immediately react in outrage if he heard the facts of the incident." Jury instructions #19, 20; Clerk's record, docket #74. It further determined that the severity of the conduct was "such that no reasonable person in a civilized society should be expected to endure it." Jury instruction #22; Clerk's record, docket #74. In awarding punitive damages, the jury further determined that defendants' actions were malicious, or wanton, or oppressive. See, e.g., jury instruction #35; Clerk's record, docket #74.

Defendants filed five post-trial motions (motion to dismiss for lack of subject matter jurisdiction; motion for

judgment notwithstanding the verdict; motion for a new trial; motion to dismiss on alternative grounds; and motion for relief from judgment; Clerk's record, docket #81-83, 95, 103), raising Feres v. United States immunity for the first time. On September 25, 1986 (after September 16, 1986 oral argument), the district court granted their motion to dismiss on alternative grounds and motion for relief from judgment, concluding that respondent's actions were incident to military service, so that under Feres, it lacked subject matter jurisdiction obligating it to dismiss plaintiff's complaint. Clerk's record, docket #111. Appendix p. 14a.

On appeal, the Ninth Circuit affirmed the district court's order, holding (1) that Feres immunity "occupies a position comparable to a restriction on subject matter jurisdiction" (837 F.2d at 398) that

can be raised after a jury verdict, and (2) that notwithstanding the parties' dual employment status, Stauber's action arose "incident to service" entitling respondents to the shield of Feres immunity. 837 F.2d at 401.

Petitioner seeks review of the Ninth Circuit's determination that Feres bars actions based on common law intentional torts between individuals when the conduct complained of (1) takes place during a regular 40 hour work week while the parties are civilian employees of the military, albeit working on a military installation, pursuant to the National Guard Technicians Act, and (2) continued off base and after hours.

REASONS FOR GRANTING THE WRIT

This action arose primarily while all parties were working as civilian mechanics for the Alaska National Guard pursuant to the National Guard Technician's Act of 1968

which provides, inter alia, for the employment of civilians to maintain and repair supplies issued to the National Guard. 32 USC §709(a)(2). There was also off-base, after-hours activity (see, infra). The parties were performing such maintenance and repair when the action arose. Absent the following two additional facts, Stauber's action would probably have proceeded in state court, as a garden variety tort action based on defendants' conduct: (1) in order to be employed as a technician, one must also maintain membership in the National Guard, and (2) the Tenth Circuit has determined that "Congress considered that the military mission of the technicians was paramount and that the technician's duties were inseparable from his or her military obligations." Martelon v. Temple, 747 F.2d 1348, 1351-52 (10th Cir. 1984). The National Guard membership of these parties

involved certain weekend duties and two weeks of summer training. Even considering that technicians also maintain a limited military status, however, and assuming the Tenth Circuit's determination is accurate, this Court has not determined whether civilian technician mechanics are working "incident to military service." If they are, Feres might bar this action. Stauber's position is that technicians are not working incident to military service, as that concept has developed, and there is no reason for Feres to bar a civilian technician mechanic from bringing an action against other civilian technician mechanics for common law intentional torts. Stauber raises no issue of actions against the sovereign or any governmental entity. Certiorari should be granted for the following specific reasons.

I.

CONFUSION AND CONFLICT IN THE CIRCUIT COURTS ABOUT THE APPLICABILITY OF FERES WHEN PLAINTIFF IS A CIVILIAN FEDERAL EMPLOYEE SERVING PURSUANT TO THE NATIONAL GUARD TECHNICIAN'S ACT

Presently there is confusion and conflict in the lower courts with regard to the applicability of Feres immunity in actions involving individuals serving in their capacity as civilian employees of the federal government under the National Guard Technician's Act (32 U.S.C. §709) and the extent to which such an action might be barred. United States v. Johnson, 107 S.Ct. 2063 (1987) precludes actions by members of the military against civilian federal employees but does not address the status of technicians and whether or not they are acting incident to military service. Johnson does not prohibit technicians from filing the type of action filed by Stauber. There was no question

but that Johnson was acting incident to military service. He was on active duty at the time of the injury. Whereas Johnson recognizes that "[c]ivilian employees of the government also may play an integral role in military activities" (107 S.Ct. at 2069 n.11), there is no determination that even those civilians are acting incident to military service. That question has not been addressed.

The Ninth Circuit has prohibited Stauber's action, concluding he was acting incident to military service, but the Eighth Circuit might have allowed the action. ("Our decision diverges somewhat from that of the Eighth Circuit in Brown v. United States, 739 F.2d 362 (8th Cir. 1984), cert. denied, 473 U.S. 904, 105 S.Ct. 3524, 87 L.Ed.2d 650 (1985), which permitted a black National Guardsman who had been the victim of a mock lynching at an on-base drinking party to sue the per-

petrators. The court held that the act could not conceivably serve any military purpose. Id. at 368." 837 F.2d at 400-401 n.10). Direction is needed as to when an act could not conceivably serve any military purpose, when it is not connected with on-duty activity, and when activity is "merely an extension of on-base events to which intramilitary immunity properly applies." 837 F.2d at 400. There may be a square and irreconcilable conflict between these two circuits.

As recognized supra, the Tenth Circuit has determined "that Congress considered that the military mission of the technicians was paramount and that the technician's duties were inseparable from his or her military obligations." Martelon v. Temple, 747 F.2d 1348, 1351-52 (10th Cir. 1984). But, technicians may maintain actions against other technicians, including their military supervisors, for

constitutional violations (see, e.g., Johnson v. Orr, 780 F.2d 386, 395 (3rd Cir. 1986) ("As we cannot infer congressional intent to preclude Guard technicians from bringing Section 1983 actions against their superiors, we will affirm the district court's decision that appellee's may maintain a cause of action against appellants under Section 1983"); Schultz v. Wellman, 717 F.2d 301 (6th Cir. 1983); NeSmith v. Fulton, 615 F.2d 196 (5th Cir. 1980); Rowe v. Tennessee, 609 F.2d 259 (6th Cir. 1979); Bollen v. National Guard Bureau, 449 F.Supp. 343 (W.D. Pa. 1978); Syrek v. Pennsylvania Air National Guard, 371 F.Supp. 1349 (W.D. Pa. 1974). Such actions are not permitted by members of the military. See, e.g., Chappell v. Wallace, 462 U.S. 296 (1983); Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986); Trerice v. Pederson, 769 F.2d 1398 (9th Cir. 1985);

see generally Note, Intramilitary Immunity and Constitutional Torts, 80 Mich. L.Rev. 312 (1981).

In Johnson v. Orr, supra, the Third Circuit rejected the "argument that, in the wake of Bush, [Bush v. Lucas, 462 U.S. 367 (1983)] allowing section 1983 actions against the National Guard 'would create technicians as a special class of federal employees' with 'remedies for alleged constitutional violation against their supervisors.'" 780 F.2d at 395 n.17. The court found that National Guard technicians, like everyone else, could bring actions based on section 1983 against those who violate their constitutional rights while acting under color of state law and that they were "rare federal employees who can be liable under section 1983." 780 F.2d at 395 n.17.

Even while assuming that technician's duties are inseparable from their military

obligations, the Martelon court seems to accept a distinction between claims that are incident to a technician's civilian employment, and ones that might result directly from their military membership. Referring to a New Jersey decision the court noted with apparent approval that the technicians' claims "were incident to their civilian, not military, employment." 747 F.2d at 1350.

Lower courts need guidance in determining whether technicians civilian duties are duties incident to service such that Feres precludes a state court action between individual technicians for common law intentional torts.

II.
IT IS IMPORTANT FOR THIS COURT TO DETERMINE HOW FAR ON-DUTY, ON-BASE ACTIVITY INCIDENT TO MILITARY SERVICE EXTENDS

The Ninth Circuit concluded that defendants' "off-base, after-hours harassment was merely an extension of on-base events

to which intramilitary immunity properly applies." 837 F.2d at 400. Assuming, arguendo, without conceding, that intramilitary immunity was properly applied to defendants' on-base activities, this Court needs to determine when that immunity is lost. The Eighth Circuit determined that immunity was lost because plaintiff was off-duty for the Memorial Day weekend, and because the activity out of which the action arose served no conceivable or remote military purpose, even though the injury occurred while the parties were on a military base. Brown v. United States, 739 F.2d 362 (8th Cir. 1984). Even if technicians' duties are "incident to military service" (a proposition obviously not conceded by Stauber) there appears to be a conflict over how far the immunity extends.

The issue of off-base, off-duty conduct was addressed in United States v.

Shearer, 473 U.S. 52 (1985), but Shearer did not involve technicians. Whereas decedent was off duty at the time of his injury, he was on active duty status with the military and his claim would have required Army officers to testify in court as to each other's decisions and actions, and would have challenged a command decision. Accord, Millang v. United States, 817 F.2d 533 (9th Cir. 1987). No military officers were even called to testify at Staubers' trial. Defendant Cline was a Warrant Officer when he was on military duty, but none of his testimony involved military decisions or actions, no command decision was challenged, and he was not on military duty when Stauber's cause of action arose. Lower courts need guidance. Under the reasoning of Brown v. United States, the Eighth Circuit might well have allowed Stauber to maintain his action.

III.

IMPORTANCE AND BROAD APPLICATION OF THE PRINCIPLES

This issue obviously has extremely broad application. All individuals employed under the National Guard Technician's Act, which provides for employment of 53,100 technicians at any one time [32 U.S.C. §709(h)], are affected. Without this Court's guidance every action that arises during the course of a technician's civilian employment may well be decided inconsistently with other similar actions.

IV.

NINTH CIRCUIT ERROR

The activity out of which this action arose was not the type of activity intended to enjoy Feres immunity. As analyzed in United States v. Johnson, 107 S.Ct. 2063 (1987):

1. The federal relationship between the government and members of the armed

services (107 S.Ct. at 2068): Even though one must be a member of the National Guard to be employed as a technician, and even if Congress considered that the military mission of technicians was paramount and that technician's duties are inseparable from their military obligations, technicians working during their forty-hour work week are civilian employees of the federal government and are not serving in their military capacity. Their work is not "incident to military service" under Feres principles. Performance of the military function that entails the significant risk of accidents and injuries anticipated in Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 672 (1977) is the risk of injury caused by negligent, not intentional, conduct, by persons on active military duty. The federal relationship concern is not present in the instant case.

Secondly, Stauber had access to no statutory disability or death benefits to compensate him for the harm caused by defendants. 107 S.Ct. at 2068.

Finally, at no time, throughout either the trial or appeal, has the judiciary been involved in sensitive military affairs, either at the expense of military discipline and effectiveness, or otherwise. 107 S.Ct. at 2069. There is no accomplishment of a military mission, or need for the instinctive obedience, unity, commitment or esprit de corps, anticipated in Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (where petitioner was on active duty when the cause of action arose) in the case at bar. The jury simply determined that over the course of several years defendants intentionally inflicted emotional distress upon Stauber and defamed

him. The one benefit Stauber may have derived from defendants' failure to raise Feres prior to trial is that this prong of the Johnson test must be decided in Stauber's favor because of the absence of any inquiry into military affairs at any time during the course of this litigation.

Even assuming that technicians' duties are "incident to military service," the Ninth Circuit extended the immunity too far when it concluded that defendants off-base, after-hours harassment of Stauber was merely an extension of on-base events, the examination of which relationship would result in an impermissible intrusion upon military matters. Any immunity available to defendants, was lost off-base and after-hours. Like the Brown court concluded, this activity

> does not involve the command relationship between a service member and his or her superiors, nor does it involve military decisionmaking with respect to disci-

> plinary matters. There is no indication that a superior officer ordered anyone to participate in this offensive (conduct), so the concern for immediate compliance with military orders and procedures is not implicated. The activity that is at issue in this claim is of a distinctly non-military nature: (intentional infliction of emotional distress over several years). The primary purpose of the Feres doctrine -- the maintenance of the military disciplinary structure -- could hardly be furthered by the application of military immunity for the participants in this (conduct). Indeed, the application of the Feres doctrine in a case such as this would insulate from liability the very breakdown of military discipline. [739 F.2d 362, 369 (8th Cir. 1984)].

Finally, the Ninth Circuit erred in relying on cases involving active duty National Guard members rather than civilian technicians who, as a condition of employment, must also be members of the National Guard.

CONCLUSION

While performing duties as civilian federal employees, technicians are by definition not military personnel on active duty. If that distinction has any meaning at all, unless civilian technicians are to be considered for all purposes active duty military personnel, they must retain the ability to bring an action against other civilian technicians for intentional torts. Clarification and guidance is needed from this Court to preclude further conflict and confusion.

For these various reasons this Petition should be granted.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 12th day of April, 1988.

LAW OFFICES OF JOSEPH N. BARCOTT

By Joseph N. Barcott
Joseph N. Barcott

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FREDERICK C. STAUBER,
Plaintiff-Appellant,

v.

RICHARD A. CLINE; FRED C. SCHARPER; RAY DUGAN,
Defendant-Appellee,

and

STATE OF ALASKA; DEPARTMENT OF MILITARY AND VETERANS AFFAIRS, OFFICE OF THE ADJUTANT GENERAL; STATE REVIEW, State Review and Appeals Board,
Defendants.

No. 86-4233

D.C. Nos.
A84-421, A83-613

OPINION

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, District Judge, Presiding

Argued June 4, 1987—Seattle, Washington
Submitted July 2, 1987

Filed January 20, 1988

Before: Cecil F. Poole and William C. Canby, Jr., Circuit Judges, and Raul Ramirez,* District Judge.

Opinion by Judge Canby

*Honorable Raul Ramirez, United States District Judge, Eastern District of California, sitting by designation.

SUMMARY

Armed Services and Veterans/Jurisdiction

Appeal from judgment. Affirmed.

Appellant Stauber and defendant-appellees were mechanics working as dual-status employees of the National Guard. Defendants were superior in rank to Stauber. All worked in an on-base National Guard maintenance shop. Stauber sued defendants in state court alleging that they continuously harrassed him, both on-and off-base, during regular work-duty hours and after hours. Defendants removed, and a jury awarded Stauber compensatory and punitive damages. Defendants made post-trial motions. The district court considered the late-raised claim of *Feres* immunity as a nonwaivable issue of subject matter jurisdiction. Based upon it, the court set aside judgment on the verdict and dismissed Stauber's action.

[1] *Feres* held that members of the armed services cannot sue the government for injuries that arise out of or are in the course of activity incident to service. [2] It has grown as a judge-made exception to the FTCA's waiver of sovereign immunity. [3] Stauber's action does not depend on any waiver of the sovereign immunity of the United States to establish jurisdiction. He brought his action in state court against the individual defendants, and federal jurisdiction was acquired by removal. Although Stauber makes no point of this distinction, it has a potential effect on the jurisdictional question. However, in the present case there is no action against the sovereign. [4] The *Feres* doctrine generally applies to claims brought by National Guard members. Stauber seeks to escape the doctrine on the ground that his claims arose while he and the defendants were civilian employees. The conduct that occurred at the shop cannot give rise to actionable tort claims without impinging on military author-

ity and calling into question matters which are exclusively the subject of military remedies. [5] Nor is Stauber entitled to establish that *some* of the defendants' conduct did not involve questions of workplace supervision, military regulations, remedies provided under those regulations, and military decisionmaking. The off-base after-hours harrassment was merely an extension of on-base events to which intramilitary immunity properly applies.

COUNSEL

Joseph N. Barcott, Anchorage, Alaska, for the plaintiff-appellant.

Malcolm Logan, Assistant United States Attorney, Anchorage, Alaska, for the defendant-appellee.

OPINION

CANBY, Circuit Judge:

The issue before us is whether intramilitary immunity bars a state-law tort action between civilian technicians for the Alaska Army National Guard who were also necessarily National Guard members when the actions arose, and whether the district court correctly held that plaintiff's injuries arose incident to military service. We conclude that defendants are immune under the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), and affirm the district court's dismissal for lack of jurisdiction.

BACKGROUND

Plaintiff-appellant Frederick C. Stauber and defendant-appellees Richard A. Cline, Fred C. Scharper, and Ray Dugan

were mechanics working as dual-status employees of the National Guard. Civilian National Guard mechanic-technicians must also be members of the National Guard, as a condition of their civilian employment. 32 U.S.C. §§ 709(b), 709(e)(1) & (2).[1] Defendants were superior in rank to Stauber, although only Cline had direct authority over him. All worked in an on-base National Guard maintenance shop in Anchorage, Alaska.

Stauber sued Cline, Scharper and Dugan in state court for intentional infliction of emotional distress and libel. He alleged that the three defendants, over a five-year period, continuously harrassed him, both on- and off-base, during regular work-duty hours and after hours.[2] Stauber also contended that defendants, not under color of their military authority and outside their line of duty, made statements to third par-

[1]*See also* 32 U.S.C. § 709(d), which provides:

> A technician employed under [32 U.S.C. § 709(a)] is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States.

[2]Stauber contended that the defendants' conduct included:

> harrassment and intimidation in the use of sirens and horns and other noisemaking devices, all directed at plaintiff; forcing plaintiff to leave his work area door open so as not to be able to shut the noise out while others were allowed to close their doors; allowing everyone in the work area except plaintiff to use ear protectors; forbidding plaintiff from working outside; following plaintiff in his automobile with sirens and horns directed at plaintiff; physically pushing plaintiff; threatening to make negative reports about plaintiff to plaintiff's superiors; maliciously and intentionally disrupting, disorganizing, and sabotaging plaintiff's work area; hiding and rearranging parts and tools and jamming plaintiff's toolbox closed; excluding only plaintiff from use and possession of keys to the common work area; driving back and forth in front of plaintiff's [off-base] home; and representing to plaintiff that eventually defendants would succeed in getting plaintiff fired from his position as a civilian technician.

Amended Complaint ¶ VIII.

ties that harmed his reputation. Before filing his action, Stauber attempted to utilize a grievance process at his workplace and spoke with union representatives; he began receiving poor job evaluations from Cline, his immediate supervisor.[3]

Defendants successfully petitioned for removal to the district court under 28 U.S.C. §§ 1441(a) & 1442(a)(1),[4] where Stauber won a jury award of $106,000 in compensatory and punitive damages.

Defendants made five post-trial motions. The district court was distressed by defendants' imprecision and delay, but felt compelled to consider the late-raised claim of *Feres* immunity as a nonwaivable issue of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3). The court determined that "at the time Plaintiff's claims arose, all parties were National Guardsmen working on a military installation under the direct command of a uniformed, full-time U.S. Army lieutenant colonel." Order on Motion to Dismiss & For Relief From Judgment Granted at 5, *Stauber* (No. A83-613). The record reflected that the employment and command structure, and the relative rank of the technicians, was the same whether the parties were on active duty on weekends or in civilian status during the week. During both periods, work in the on-base maintenance shop was essentially the same, and was governed by military regulations and standard operating procedures. The court assumed that, for some purposes, the parties were civilian employees of the Army, but nonetheless held that

> [t]his does not alter the fact that Plaintiff and Defen-

[3]Although Stauber ultimately was terminated from his employment, this tort action concerns events occurring before his termination only.

[4]Stauber resisted removal and twice moved for remand to state court, but does not presently challenge the district court's jurisdiction. In its pretrial jurisdictional rulings, the district court found that the defendants were federal officers acting under color of their authority.

> dants were also Army National Guardsmen who performed the maintenance and repair work on vehicles and equipment used by the Army National Guard. Indeed, Plaintiff and Defendants used this equipment on weekends when they were on active duty. The work performed by Plaintiff and Defendants was beyond any question incident to military service. The *Feres* doctrine therefore applies, and Defendants are immune from suit.

Id. at 5. The court therefore set aside judgment on the verdict and dismissed Stauber's action.

DISCUSSION

I. WAIVER OF *FERES* IMMUNITY

Stauber argues that the district court erred in considering *Feres* immunity because defendants failed to raise the issue as an affirmative defense. The district court adopted defendants' position that the immunity could not be waived because it is an issue of subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3); *see Jablonski by Pahls v. United States*, 712 F.2d 391, 394-95 (9th Cir. 1983); *Beers v. Southern Pac. Transp. Co.*, 703 F.2d 425, 429 (9th Cir. 1983). We review *de novo* the district court's decision to consider appellees' late claim of intramilitary immunity. *E.g., United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

[1] In *Feres v. United States*, the Supreme Court held that members of the armed services could not sue the government for injuries that "arise out of or are in the course of activity incident to service." 340 U.S. at 146, *quoted in United States v. Johnson*, _ U.S. _, 107 S. Ct. 2063, 2066 (1987). The Court grounded its ruling on the fact that relations between the government and its military personnel were "distinctively federal in character," exclusively governed by federal law, and that a

comprehensive, even-handed government compensation scheme was available for service-connected injuries. *Feres*, 340 U.S. at 143-45. Later Supreme Court decisions emphasized the effect that private lawsuits might have on military discipline. *See, e.g., United States v. Shearer*, 473 U.S. 52, 57 (1985); *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 671-72 (1977).

[2] In cases arising under the Federal Tort Claims Act, we have viewed the *Feres* doctrine as a limitation on the jurisdiction of the courts. *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987); *Millang v. United States*, 817 F.2d 533, 534-35 (9th Cir. 1987); *Bon v. United States*, 802 F.2d 1092, 1094 (9th Cir. 1986); *Broudy v. United States*, 661 F.2d 125, 128 n.5 (9th Cir. 1981); *Monaco v. United States*, 661 F.2d 129, 131 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982). Although *Feres* itself did not compel dismissal for lack of subject matter jurisdiction, such a result comports with the development of the doctrine, which has grown as a judge-made exception to the Federal Tort Claims Act's (FTCA's) waiver of sovereign immunity.[5]

[3] In contrast to *Atkinson, Millang, Bon, Broudy*, and *Monaco*, Stauber's action does not depend on any waiver of the sovereign immunity of the United States to establish jurisdiction. He brought his action in state court against the individual defendants, and federal jurisdiction was acquired by removal. Although Stauber makes no point of this distinction, it has a potential effect on the jurisdictional question. When *Feres* is applied as an exception to Congress's waiver of sovereign immunity in the Federal Tort Claims Act, it is an easy step to say that the exception takes the case out of the

[5] *Feres* was not a jurisdictional case. In its decision, the Court stated that "[j]urisdiction of the [government] now exists [under the Federal Tort Claims Act] where the [government] was immune from suit before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law." *Feres*, 340 U.S. at 141.

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waiver, and that the federal court has no jurisdiction to entertain a suit against the sovereign. That analysis cannot apply here, because no action against the sovereign is before us.

Nevertheless, we conclude that the *Feres* doctrine, in light of the reasoning underlying it, occupies a position comparable to a restriction on subject matter jurisdiction, so that the district court was correct to apply the doctrine despite its untimely invocation. As we will more fully explain in dealing with the district court's ruling on the merits of the *Feres* issue, the *Feres* doctrine has come to rest at least in significant part on the view that the judiciary ought not to intrude in military affairs.[6] Thus the *Feres* rule has been interpreted as necessary to avoid the courts' second-guessing military decisions, or impairing military discipline. *Shearer*, 473 U.S. at 57; *see Chappell v. Wallace*, 462 U.S. 296, 304 (1983). Indeed, courts have even been viewed as " 'ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.' " *Chappell*, 462 U.S. at 305 (quoting Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181. 187 (1962)). I 399

Thus the *Feres* doctrine, as presently interpreted, has far more to do with the proper relation between the courts, Congress and the military than it has to do with individual defendants. It is not a matter of personal immunity of the military

[6]Declining to permit review of National Guard internal operations on justiciability grounds, in *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), the Supreme Court noted that

> it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.

Id. (emphasis in original), *quoted in Chappell v. Wallace*, 462 U.S. 296, 302 (1983); *see Sebra v. Neville*, 801 F.2d 1135, 1140-41 (9th Cir. 1986).

personnel who may be defendants in a *Bivens*-type action incident to military services. *Stanley*, _ U.S. _, 107 S.Ct. 3054, 3064 (1987). It is a judicial doctrine leaving matters incident to service to the military, in the absence of congressional direction to the contrary. For these reasons, we conclude that the district court was correct in holding that the *Feres* defense was not waived when defendants failed to raise it until after trial. The doctrine is tantamount to a limitation of subject matter jurisdiction.

II. APPLICABILITY OF *FERES* IMMUNITY TO THE PRESENT CLAIMS

[4] It is beyond question that the *Feres* doctrine generally applies to claims brought by National Guard members. *See, e.g., Stencel Aero*, 431 U.S. at 673; *Anderson v. United States*, 724 F.2d 608, 610 (8th Cir. 1983); *cf. Sebra v. Neville*, 801 F.2d 1135, 1140-41 (9th Cir. 1986) (*justiciability* doctrine restricts review of military *decisions* involving civilian National Guard technician because civilian National Guard employees must hold military rank). Stauber seeks to escape the doctrine on the ground that his claims arose while he and the defendants were civilian employees. Although the technicians had dual status for some purposes, the defendants respond that military regulations, standard operating procedures, and active-duty military officers controlled how the shop was run.[7] *See Johnson*, 107 S. Ct. at 2069 (because pilot was acting pursuant to standard operating procedures at time of death, suit could implicate military discipline); *Millang*, 817 F.2d 533, 535 n.3 (*Feres* immunity applies upon showing that persons involved were subject to military control; showing of actual control unnecessary). We agree that the conduct that occurred at the maintenance shop cannot give rise to

[7]In his affidavit, Cline's direct supervisor, the active-duty Executive Officer of the Fifth Battalion, stated that "[a]ny and all decisions regarding the mission, staffing and operation of the OMS Shops are made by Federally Recognized military officers."

actionable tort claims without impinging on military authority and calling into question matters which are exclusively the subject of military remedies. *Stanley,* 107 S. Ct. at 3063 (mere process of determining "which particular suits would call into question military discipline and decision-making would itself require judicial inquiry into, and hence intrusion upon, military matters"); *Chappell v. Wallace,* 462 U.S. 296, 305 (1983).[8]

In 1984, in the *Shearer* decision, the Supreme Court noted that "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the [FTCA] as it has been construed in *Feres* and subsequent cases." 473 U.S. at 57. The Court in *Shearer* focused on the effect of suits between military personnel on military discipline and the problem of having civilian courts second-guessing military decisions. *Shearer,* 473 U.S. at 57-58 & n.4; *see Atkinson,* 825 F.2d 202 (9th Cir. 1987); *Millang,* 817 F.2d at 535.

Very recently, in the *Johnson* decision, the Supreme Court reaffirmed and broadened the *Feres* rule. It held that *Feres* immunity extended to a FTCA action brought by the widow of a Coast Guard pilot killed during the course of activities clearly incident to service; Mrs. Johnson alleged that the crash occurred because of the negligence of *civilian* federal air traffic controllers.[9] *Johnson,* 107 S. Ct. at 2064. Strengthening

[8]The district court's determination that the claims arose incident to military service is a factual finding; yet we review *de novo* dismissals for lack of subject matter jurisdiction under the *Feres* doctrine. *E.g., Bon,* 802 F.2d at 1094 (citations omitted).

[9]The Eleventh Circuit in *Johnson* had reversed the district court's dismissal under *Feres. Johnson v. United States,* 749 F.2d 1530 (11th Cir. 1985). The three-judge circuit panel concluded that Johnson's action had no effect on military discipline and no scrutiny of military decisions would result. *Id.* at 1539. The Eleventh Circuit en banc court reinstated the panel opinion, concluding that *Shearer,* supported the panel's interpretation of *Feres. Johnson v. United States,* 779 F.2d 1492, 1493 (11th Cir. 1986) (per curiam) (en banc). In reversing the en banc decision, however, the Supreme Court majority opinion made no reference to *Shearer*'s statements that effect on discipline and avoiding scrutiny of military decisions were determinative. *See Johnson,* 107 S. Ct. 2063.

Feres' prohibition on judicial review that would, even remotely, examine military decisions, the Court stated:

> Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission.
>
> . . . .
>
> Civilian employees of the Government also may play an integral role in military activities. In this circumstance, an inquiry into the civilian activities would have the same effect on military discipline as a direct inquiry into military judgments. For example, the [Federal Aviation Administration] and the United States Armed Services have an established working relationship that provides for [Federal Aviation Administration] participation in numerous military activities.

Id. at 2069 & n.11. The *Johnson* majority also suggested that permitting military personnel to sue the government for injuries resulting from activities incident to their service on the basis of *any* government employee's negligence seriously undermines "duty and loyalty to one's service and to one's country." *Id.* at 2069.

Here, the district court found that in their work Stauber and the defendants were always under the direct command of active-duty military officers. The parties shared the same direct military relationships whether on civilian or military status. Their conduct was subject to military discipline, and indeed, plaintiff requested that his superiors step in to improve the situation. *Compare Millang,* 817 F.2d at 535 (all participants, including civilians, were subject to military statutes, regulations, and orders).

Shearer and *Johnson* were not actions against individual, nongovernmental defendants. Nonetheless, we conclude that the National Guard mechanic-technicians' work was just as integral to routine military activities as was the work of the air traffic controllers held to be immune in *Johnson*. Stauber's claims "are the '*type[s]* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.' " *Johnson*, 107 S. Ct. at 2069 (brackets in original) (quoting *Shearer*, 473 U.S. at 59 (emphasis in original)).

[5] Nor is Stauber entitled to establish that *some* of the defendants' conduct did not involve questions of workplace supervision, military regulations, remedies provided under those regulations, and military decisionmaking. Although Stauber alleged that some of the harrassment occurred off-base, the district court concluded that his claims arose from conduct in the workplace. On appeal, Stauber has failed to show that this finding was clearly erroneous. Moreover, it is clear from the record that the off-base, after-hours harrassment was merely an extension of on-base events to which intramilitary immunity properly applies. To examine the relationship between on- and off-base events in this case, beyond determining that the conduct involved was incident to service, would result in an impermissible intrusion upon military matters.[10] Stauber's action was correctly dismissed under *Feres* and *Johnson*. I 401

[10] *See Stanley*, 107 S. Ct. at 3063. In *Shearer*, the Supreme Court observed:

> To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct.

Shearer, 473 at 58 (citations omitted).

CONCLUSION

Notwithstanding the parties' dual employment status, we agree that Stauber's action arose "incident to service." *See Johnson*, 107 S. Ct. at 2068 ("An examination of [the rationale underlying the *Feres* doctrine] demonstrates that the status of the alleged tortfeasor does not have ... critical significance ...."). [11] Defendants, therefore, are immune from suit.

AFFIRMED. [12]

Our decision diverges somewhat from that of the Eighth Circuit in *Brown v. United States*, 739 F.2d 362 (8th Cir. 1984), *cert. denied*, 473 U.S. 904 (1985), which permitted a black National Guardsman who had been the victim of a mock lynching at an on-base drinking party to sue the perpetrators. The court held that the act could not conceivably serve any military purpose. *Id.* at 368. At the same time, the court held that suit against superior officers for failing to prevent or investigate the incident was barred by *Feres*. *Brown* may be distinguishable from our case in that the mock lynching was less connected with on-duty activity and with the command relationship than was the harrassment of Stauber by the defendants here. In any event, *Brown* was decided before the Supreme Court in *Johnson* broadened the categories of activities that may be viewed as implicating military discipline under the *Feres* doctrine. *See Johnson*, 107 S.Ct. at 2069. Indeed, it is enough that the injury arose out of "activity incident to service." *Stanley*, 107 S.Ct. at 3063 (quoting *Feres*, 340 U.S. at 146).

[11] Thus, it is unnecessary to determine whether the parties were technically under a civilian, military, or hybrid status at the time of the injurious acts. *See Martelon v. Temple*, 747 F.2d 1348, 1351-52 (10th Cir. 1984) (legislative history of National Guard Technicians Act, 32 U.S.C. § 709 (e), demonstrates that Congress considered military mission of technicians paramount and technicians' duties inseparable from military obligations), *cert. denied*, 471 U.S. 1135 (1985).

[12] We endorse the district court's statement that "[t]o tax either costs or attorney's fees against Plaintiff in this case would very literally add insult to injury." Order at 6. Each party shall bear its own costs.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

FREDERICK C. STAUBER, Plaintiff, vs. RICHARD A. CLINE, FRED C. SCHARPER, and RAY DUGAN, Defendants.	No. A83-613 Civil (Consolidated)
FREDERICK C. STAUBER, Plaintiff, vs. STATE OF ALASKA, DEPARTMENT OF MILITARY AND VETERANS' AFFAIRS, OFFICE OF THE ADJUTANT GENERAL; STATE REVIEW AND APPEALS BOARD; and RICHARD A. CLINE, Defendants.	O R D E R (Motion to Dismiss and for Relief from Judgment Granted)

The trial jury in this case returned a verdict in favor of Plaintiff and against

Defendants on Plaintiff's claims for intentional infliction of emotional distress and defamation. The jury also found for Plaintiff on his claim for punitive damages. Judgment on the verdict was entered February 12, 1986.

In the two months following entry of judgment, Defendants filed a motion to dismiss, a motion for new trial or for a judgment notwithstanding the verdict, a motion to dismiss on "alternate grounds", and a motion for relief from judgment. Meanwhile, Plaintiff filed a motion for attorney's fees.

Because they are moot in light of the following disposition of other motions, Plaintiff's motion for attorney's fees is denied as are Defendants' motions for a new

trial or for judgment notwithstanding the verdict. Similarly, the Court need not reach Defendants' motion to dismiss, for their remaining motions for a dismissal on alternative grounds and for relief from judgment are dispositive of the case. By the latter motions, Defendants argue that the Feres doctrine precludes subject matter jurisdiction in the present case.

In Feres v. United States, 340 U.S. 135, 146 (1950), the Supreme Court held that members of the armed forces may not maintain an action against the United States for tortious injuries occurring incident to their military service.

The Feres doctrine applies with equal force to members of the National Guard, and bars suits between guardsmen. Misko v.

United States, 453 F. Supp. 513, 514 (D.D.C. 1978); Anderson v. United States, 724 F.2d 608, 610 (8th Cir. 1983). Where the Feres doctrine applies, both the United States and members of the National Guard are immune from suit. In such a situation, the Court is precluded from entertaining the suit at all--there is a total want of jurisdiction.

Plaintiff contends that the question of what is or is not incident to military service is a question of fact for the jury to decide and that the question was waived when not presented at trial. The matter of what is or is not incident to military service certainly has factual aspects, but it is a matter which the Court must determine as a part of its obligation to ascertain that it has jurisdiction.

It is most unfortunate for all concerned that Defendants did not raise the jurisdictional issue which now confronts the Court at a much earlier date in these proceedings, but their failure to do so does not constitute a waiver. Rule 12(h)(3), Federal Rules of Civil Procedure, provides that:

> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Indeed, jurisdictional questions of the sort now posed sometimes arise only on appeal, and even then a plaintiff's claim is subject to dismissal if it should appear that the district court was without jurisdiction. See, 5 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1350 at 544-45 and § 1393 (1979).

Plaintiff also argues that Defendants' motion for relief from judgment is not one properly brought under Rule 60(b)(4), Federal Rules of Civil Procedure. Rule 60(b)(4) provides that:

> On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons ...
>
> ....
>
> (4) the judgment is void ....

Even the case upon which Plaintiff relies (Lubben v. Selective Service System, Local Board No. 27, 453 F.2d 645, 649 (1st Cir. 1972)), holds that absence of subject matter jurisdiction may render a judgment void under Rule 60(b)(4). The Lubben court distinquishes between such a total want of jurisdiction and the erroneous exercise of

jurisdiction which will not render the judgment void. Unfortunately for Plaintiff, in the instant case the Court is faced with a total want of jurisdiction situation. Therefore, Defendants' motion for relief from judgment is properly brought under Rule 60(b)(4). See 5 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1350 at 545 and § 1393 at 866.

National Guardsmen are covered by the Feres doctrine in situations wherein they are subject to military control and supervision or when they are engaged in an activity dependent upon their military status. Herreman v. United States, 476 F.2d 234 (7th Cir. 1973); Miller v. United States, 643 F.2d 481 (7th Cir. 1980).

In the present case, at the times Plaintiff's claims arose, all parties were National Guardsmen working on a military installation under the direct command of a uniformed, full-time U.S. Army lieutenant colonel. Furthermore, their employment was conditioned on being enlisted in the National Guard, and would not have been available to them if they were civilians. Pursuant to 32 U.S.C. § 709(b), only members of the National Guard could be so employed.

Plaintiff contends that he and the Defendants were civilians, not on active duty at the time the claims in question arose. The Court assumes, without deciding, that for some purposes Plaintiff and Defendants may have been civilian

employees of the Army. This does not alter the fact that Plaintiff and Defendants were also Army National Guardsmen who performed the maintenance and repair work on vehicles and equipment used by the Army National Guard. Indeed, Plaintiff and Defendants used this equipment on weekends when they were on active duty. The work performed by Plaintiff and Defendants was beyond any question incident to military service. The Feres doctrine therefore applies, and Defendants are immune from suit. It necessarily follows that the Court is without subject matter jurisdiction and Plaintiff's complaint must be dismissed.

This case has troubled the Court from a number of respects. Not only were substantive, dispositive motions that

should have been filed before trial not presented, but, even when Defendants' post-trial motions began appearing they were off the mark. As a consequence, counsel and the judicial system wasted a great deal of time and money. In consideration of these circumstances, and in accordance with the express language of Rule 60(b)(4), the Clerk of Court is instructed to reject any application by Defendants for costs in conjunction with this litigation. Similarly, Defendants should not even consider applying to the Court for attorney's fees. To tax either costs or attorney's fees against Plaintiff in this case would very literally add insult to injury.

The judgment herein is set aside, and Plaintiff's complaint is dismissed. The Clerk of Court shall enter judgment accordingly.

DATED at Anchorage, Alaska, this 25th day of September, 1986.

/s/
United States District Judge

cc: Joseph Barcott
Malcom Logan, AUSA
Susan Cox, AAG

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

FREDERICK A. STAUBER	JUDGMENT IN A CIVIL CASE
v.	
RICHARD A CLINE, FRED C. SCHARPER and RAY DUGAN	CASE NUMBER: A83-613 Civil (Consolidated)

x Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED I. As to plaintiff's claim for intentional infliction of emotional distress that plaintiff have judgment against defendant Cline in the amount of $15,000.00, that plaintiff have judgment against defendant Dugan in the amount of $10,000.00, and that plaintiff have judgment against defendant Scharper in the amount of $15,000.00.

II. As to plaintiff's claim for defamation, plaintiff shall have judgment against Cline in the amount of $36,000.00. As to defendnats (sic) Scnarper and Dugan, the plaintiff's claim for defamation is dismissed.

III. As to plaintiff's claim for punitive damages that plaintiff have judgment against defendant Cline in the amount of $10,000.00, that plaintiff have judgment against defendant Dugan in the amount of $10,000.00, and that plaintiff have judgment against defendant Scharper in the amount of $10,000.00.

Interest pursuant to 28 USC 1961 7.85 %

Total costs taxed in favor of plaintiff and against defendants
$754.99. 2/28/86

Copies redistribued to counsel w/interest rate
8/18/86 - ps

APPROVED /s/ JO ANN MYERS
U.S. DISTRICT JUDGE Clerk
February 12, 1986
Date

/s/
(By) Deputy Clerk

cc: Joseph N. Barcott
U. S. Attorney
Alaska Attorney General

Joseph N. Barcott
310 K Street
Suite 500
Anchorage, Alaska 99501
338-6508

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

FREDERICK C. STAUBER, Plaintiff, vs. RICHARD A. CLINE, FRED C. SCHARPER, AND RAY DUGAN, Defendants.	)	Case No. A83-613 Civ. AFFIDAVIT OF FRED STAUBER
STATE OF ALASKA THIRD JUDICIAL DISTRICT	) ss.	

COMES NOW Fred Stauber, being first duly sworn, upon his oath, deposes and states as follows:

1. I am the plaintiff in the above captioned action.

2. On several occasions I have employed the grievance procedures designated in the collective bargaining agreement between the National Guard Technicians and the Guard (Article XIV) to complain about the harassment I was experiencing on the job, and asked union officials for help and representation, to no avail. For some reason my complaints were not processed in good faith.

3. Numerous times prior to March 4, 1983 I tried to talk to Cline about the harassment I was being subjected to from Dugan and Scharper but did not get anywhere. I knew Cline was aware of the situation as at times I saw him observing what occurred.

On March 4, 1983 at 3:00 p.m., I went to see Cline's supervisor, Major Thomas Clark, about Cline and the actions of Dugan and Scharper. I told him that what I was discussing with him I had reported to Cline but that I had not gotten anywhere, so I was taking it to him because he was the next step. As I was leaving, he called Cline and told him he wanted to talk to him.

Soon after 3:30 p.m. as we were getting ready to leave, Cline came into the shop and told Dugan and Scharper what I had told Clark. Cline then told me that "nobody" puts him on the carpet. He said he was going to write letters on me, that my work was not complete, and that I could not get it done in the allotted time. I

answered that it would not be any different than he had been doing.

After I received an unsatisfactory performance rating for September 1, 1981 to August 30, 1982, I talked to union steward Wilbur E. Fynskov about appealing the rating. He determined I had reason to appeal and scheduled it so that I could do so with the appropriate union official as the next step in the grievance procedure. This took place at what was to be a union meeting at the armory. Fynskov introduced me to Neil Amin, and I showed him my papers and the previous correspondence with Cline and Clark.

Neil Amin told me I would need a copy of the cover sheet and if it was anything but "unacceptable" I could not appeal.

Reading my paperwork he realized it involved Cline and things abruptly changed. He gave me what amounted to a lecture on his dealings with Cline, emphasizing Cline's good points, and I did not get anywhere again.

A few weeks later, Cline called me into his office and showed me that he had upgraded the unacceptable rating to marginally acceptable, which meant that I could not appeal. He also informed me that he could rate me again in 120 days. This action, coming so soon after my talking to Neil Amin, made me realize I could not expect any help from the union.

4. On many occasions Cline, Scharper, and Dugan have harassed me and attempted to intimidate me outside of what

I would call the line of duty. My work bay was between those of Dugan and Scharper. I was subjected to their harassment from both sides and sometimes they came into my bay. Dugan and Scharper used sirens, horns, and blew an air hose through a pipe to create ear-piercing noises on both sides of me.

A typical day was March 16, 1983. After a day of much harassment, Cline, Dugan and Scharper got ready to leave when I did. Dugan and Scharper came behind me with their noise makers. I walked into the office to get away from them but they followed me with the noises. I walked to the yard to escape them and as I passed the big electric horn, it went off with a deafening blast. I walked around the corner of the building and through the

window I could see Dugan dial the number and put the receiver back down which was setting off the horn. I walked back around the corner of the building just as Dugan and Scharper came out of the door. They followed me out to my jeep still using their noise makers and got into their vehicles when I got into mine. They started blowing their vehicle horns and used the noise makers through their PA systems as they followed me toward home until I turned off.

On January 13, 1983 Dugan came up to me rubbing his hands together which were full of hand cleaner and water. He was in my bay and pushed his hands directly in front of my face so close that I had to

step back or get my face full. This was one of many attempts to make me take a swing at him.

On March 10, 1983 at 3:00 p.m., Dugan came up to me and said, "I'm watching every move you make and I'm running to Cline (trying to irk me)."

With only Dugan, Scharper and myself in the shop many things happened to cause me as much distress as possible. For example, I would find the lug nuts I had laid out in order earlier all mixed up; parts I had left on my bench I would find on the bottom in the solvent tank; etc.

One morning Dugan and Scharper stood around waiting for me to open my tool box. When I needed a tool, I could not get the tool box drawer open. My tool box had been

rolled and screwdrivers were holding the drawers shut. As I struggled with the problem, they laughed as though enjoying a joke which was their reaction every time something was done to harass and provoke me.

Time and again when only the three of us were in the shop, I would go out in back of the building to the parts trailer, or for something else. When I would try to get back in I would find someone had locked the door so I would have to return by way of the other end of the building and through Cline's office. Cline had given everyone in the shop a key except me.

Dugan and Scharper wore their sound protectors at will and as needed in their harassing. Working, and not knowing when

the next sound of blasts were coming, I was often caught unprepared. At times, even with sound protectors on, it would be unbearable. I finally bought a pair of sound protectors with radio speakers hoping to drown out some of their noise makers. Cline told me that if I continued to wear them he would write me up for it even though I explained why I was wearing them.

I tried keeping the door to my bay closed to escape some of the noise. Cline ordered me to keep it open but allowed Dugan and Scharper to open and close theirs at will.

In warm weather I tried to work outside as much as possible. When Cline saw that he ordered me back inside to work.

There was no escape from the harassment I was experiencing and expected to work under. The only relief was when I took time off from work or when Dugan and Scharper were not there. One afternoon I left work early and went home. Soon after I arrived home, I saw Dugan and Scharper driving Guard vehicles back and forth in front of my house.

The situation became so bad that I had to take a week off during May, 1983, to settle my nerves.

Further Affiant Sayeth Naught.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 14th day of March, 1984.

/s/
Fred Stauber

SUBSCRIBED AND SWORN to before me, a notary public in and for the State of Alaska, this 14th day of March, 1984.

/s/
Notary Public in and for Alaska
My commission expires:_____

Supreme Court, U.S.
FILED
JUL 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1707

In the Supreme Court of the United States

OCTOBER TERM, 1988

FREDERICK C. STAUBER, PETITIONER

v.

RICHARD A. CLINE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether respondents, a group of National Guard technicians, were engaged in activity incident to their military service and are, on that account, immune from a fellow technician's state law tort action for intentional infliction of emotional distress.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Bailey v. *Van Buskirk*, 345 F.2d 298 (9th Cir. 1965), cert. denied, 383 U.S. 948 (1966)	7
Barr v. *Matteo*, 360 U.S. 564 (1959)	6, 7-8
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)	5
Bois v. *Marsh*, 801 F.2d 462 (D.C. Cir. 1986)	6
Boyle v. *United Technologies Corp.*, No. 86-492 (June 27, 1988)	5, 6
Brown v. *United States*, 739 F.2d 362 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985)	10
Chappell v. *Wallace*, 462 U.S. 296 (1983)	5
Dinsman v. *Wilkes*, 53 U.S. (12 How.) 390 (1852)	6
Feres v. *United States*, 340 U.S. 135 (1950)	3, 4, 6
Fountain v. *United States*, 533 F. Supp. 698 (W.D. Ark 1981)	7
Hefley v. *Textron, Inc.*, 713 F.2d 1487 (10th Cir. 1983)	7
Holdiness v. *Stroud*, 808 F.2d 417 (5th Cir. 1987)	6
Jaffee v. *United States*, 663 F.2d 1226 (3d Cir. 1981), cert. denied, 456 U.S. 972 (1982)	7
Johnson v. *Orr*, 780 F.2d 386 (3d Cir.), cert. denied, 479 U.S. 828 (1986)	11
Jorden v. *National Guard Bureau*, 799 F.2d 99 (3d Cir. 1986), cert. denied, No. 86-1382 (Oct. 5, 1987)	10, 11
Kennedy v. *Maginnis*, 393 F. Supp. 310 (D. Mass. 1975)	7
Martelon v. *Temple*, 747 F.2d 1348 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985)	9
Mattos v. *United States*, 412 F.2d 793 (9th Cir. 1969)	7

Cases – Continued: Page

Mollnow v. *Carlton*, 716 F.2d 627 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984) 7
NeSmith v. *Fulton*, 615 F.2d 196 (5th Cir. 1980) 9, 10
Rotko v. *Abrams*, 338 F. Supp. 46 (D. Conn. 1971), aff'd per curiam, 455 F.2d 992 (2d Cir. 1972) 7
Stencel Aero Engineering Corp. v. *United States*, 431 U.S. 666 (1977) 5
Trerice v. *Pedersen*, 769 F.2d 1398 (9th Cir. 1985) 6-7
Trerice v. *Summons*, 755 F.2d 1081 (4th Cir. 1985) 7
United States v. *Johnson*, No. 85-2039 (May 18, 1987) ... 4
United States v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973) 5
United States v. *Shearer*, 473 U.S. 52 (1985) 4
United States v. *Stanley*, No. 86-393 (June 25, 1987) 5
Wilkes v. *Dinsman*, 48 U.S. (7 How.) 89 (1849) 6

Statutes:

Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* 4, 5
National Guard Technicians Act of 1968, 32 U.S.C. 709 2
32 U.S.C. 709(a) 2
32 U.S.C. 709(b) 2, 8
32 U.S.C. 709(e)(1) 2, 8
32 U.S.C. 709(e)(4)-(6) 8
32 U.S.C. 709(e)-(h) 2
32 U.S.C. 709(f)-(g) 8
28 U.S.C. 1442 3
42 U.S.C. 1981 10
42 U.S.C. 1983 ..... 10, 11

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 837 F.2d 395. The opinion of the district court (Pet. App. 14a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1988. The petition for a writ of certiorari was filed on April 15, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a former National Guard technician, seeks review of a court of appeals' decision affirming a district court's post-trial dismissal of petitioner's state law tort suit alleging that his fellow employees engaged in intentional infliction of emotional distress.

1. The National Guard Technicians Act of 1968, 32 U.S.C. 709 (the Act), authorizes the Secretary of the Army and the Secretary of the Air Force to hire technicians for "the administration and training of the National Guard" and the maintenance and repair of supplies issued to the National Guard or the armed forces" (32 U.S.C. 709(a)). It specifically requires that a technician "shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position" (32 U.S.C. 709(b)). The Act further provides that if a technician is separated from the National Guard or ceases to hold the military grade specified for his position, he promptly shall be separated from his employment (32 U.S.C. 709(e)(1)). The Act sets forth other bases for separation and other provisions governing the employment relationship (32 U.S.C. 709(e) through (h)).

Petitioner and respondents were maintenance and repair technicians hired under the National Guard Technicians Act and assigned to the 297th Infantry Group of the Alaska Army National Guard. They worked at a military installation under the direct command of a full-time, uniformed, United States Army lieutenant colonel (Pet. App. 3a-4a, 21a). Respondent Cline, who held the rank of chief warrant officer, was petitioner's immediate supervisor, while respondents Sharper and Dugan were coworkers, superior in rank to petitioner. Their work consisted of maintaining and repairing the Infantry Group's vehicles and equipment (Pet. 7; Pet. App. 4a).

2. In 1983, petitioner filed this action in Alaska state court alleging that respondents had subjected him to various state law torts, including intentional infliction of emotional distress. He contended that respondents harassed and intimidated him, while at work and to some extent off base, with the use of horns, sirens, and noisemakers; that respondents sabotaged his work area by removing and

rearranging tools; that they refused to give him keys to the common work area; and that they taunted him and threatened to give him bad work reviews so that he would be fired (Pet. App. 4a). The United States Attorney assumed representation of respondents and removed the action to federal district court pursuant to 28 U.S.C. 1442. The case was tried and a jury returned a verdict awarding petitioner compensatory and punitive damages. Pet. App. 4a-5a.

Following trial, respondents moved to dismiss the action on the ground (among others) that they were immune from state law tort claims under the principles of intramilitary immunity set forth in *Feres* v. *United States*, 340 U.S. 135 (1950). The district court concluded that the work performed by petitioner and respondents as National Guard technicians "was beyond any question incident to military service" and that the "*Feres* doctrine therefore applies, and [respondents] are immune from suit" (Pet. App. 22a). The district court accordingly set aside the judgment and dismissed petitioner's complaint (*id.* at 24a).

The court of appeals affirmed (Pet. App. 1a-13a). The court acknowledged that this case, unlike *Feres*, is not an action against the United States (Pet. App. 7a-8a), but nevertheless concluded that *Feres* principles precluded petitioner's common law tort suit for damages against fellow National Guardsmen (*id.* at 7a, 12a).[1] The court of appeals concluded that the nature of the technicians' work was an integral part of routine military activities and was

---

[1] The court of appeals rejected petitioner's argument that respondents' post-trial invocation of the *Feres* defense came too late and constituted a waiver of the defense (Pet. App. 6a-9a). The court of appeals characterized the defense as "comparable to a restriction on subject matter jurisdiction," and thus found it unwaivable (*id.* at 8a). Petitioner has not raised the waiver question in his petition to this Court. See note 4, *infra*.

subject to military command structures and military discipline (*id.* at 11a-12a). The court of appeals therefore rejected petitioner's argument that the work was essentially civilian and outside *Feres'* scope (*id.* at 9a-12a).

ARGUMENT

Petitioner contends that the court of appeals erred in affirming the district court's dismissal of his state law tort action against his National Guard co-workers. We submit that while the court of appeals' characterization of the *Feres* doctrine is not precisely accurate—for reasons other than those suggested by petitioner—the court's result is nonetheless correct and consistent with the decisions of this Court and the other courts of appeals. There is, accordingly, no warrant for further review.

1. The federal courts have repeatedly recognized a bar to tort suits of various kinds, based on the existence of a military relationship and the fact that the suit arises from activities incident to military service. This Court held in *Feres* v. *United States,* 340 U.S. 135 (1950), that the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, does not waive the government's immunity from serviceman tort suits that "arise out of or are in the course of activity incident to service" (340 U.S. at 146). See also, *e.g.*, *United States* v. *Johnson*, No. 85-2039 (May 18, 1987), slip op. 4; *United States* v. *Shearer*, 473 U.S. 52, 57 (1985). As the Court has explained, "a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission" (*Johnson*, slip op. 9 (footnote omitted)), and such claims, if generally permitted, " 'would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness' " (*ibid.* (citation omitted)). The Court has applied the same

reasoning in third-party indemnity suits against the government, reasoning that "where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party." *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977).

In a similar vein, this Court held in *Chappell* v. *Wallace*, 462 U.S. 296 (1983), that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations" (*id.* at 305 (footnote omitted)). The Court explained that "[a]lthough this case concerns the limitations on the type of nonstatutory damages remedy recognized in *Bivens* [v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)], rather than Congress' intent in enacting the Federal Tort Claims Act, the Court's analysis in *Feres* guides our analysis in this case" (462 U.S. at 299). "Here, as in *Feres*, we must be 'concern[ed] with the disruption of "[t]he peculiar and special relationship of the soldier to his superiors" that might result if the soldier were allowed to hale his superiors into court' " (*id.* at 304 (citations omitted)). See also *United States* v. *Stanley*, No. 86-393 (June 25, 1987).

Most recently, this Court held in *Boyle* v. *United Technologies Corp.*, No. 86-492 (June 27, 1988), that a military contractor is immune, in certain circumstances, from a service member's state law tort suit based on design defects in military equipment (slip op. 11). The Court observed that it had developed federal common law to displace state law in cases of peculiarly federal concern, such as cases involving the interpretation of government contracts (*e.g.*, *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973)) and the civil liability of federal

officials for actions taken in the course of their duty (*e.g.*, *Barr* v. *Matteo*, 360 U.S. 564 (1959)). The Court concluded that state laws imposing civil liability in the military contractor context similarly conflict with a "uniquely federal interest" associated with military procurement (*Boyle*, slip op. 6) and the need for government discretion in "the selection of the appropriate design for military equipment to be used by our Armed Forces" (*id.* at 10).

This case presents an instance of intramilitary immunity that is related to, but ultimately distinct from *Feres, Chappell,* and *Boyle*; namely, whether military service members, acting incident to service, are immune from state law tort suits by fellow service members. This Court has always assumed such immunity to exist. See *Feres*, 340 U.S. at 141 ("We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving." (footnote omitted)).[2] The lower courts have uniformly held that service members are immune from such suits for actions incident to their military service, whether based on intentional or negligent conduct. See, *e.g.*, *Holdiness* v. *Stroud*, 808 F.2d 417, 426 (5th Cir. 1987); *Bois* v. *Marsh*, 801 F.2d 462, 471 (D.C. Cir. 1986); *Trerice* v. *Pedersen*,

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[2] The *Feres* decision contains (340 U.S. at 141 n.10) a marginal citation to *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390 (1852), distinguishing that case as involving an intentional tort. In *Dinsman*, this Court permitted a marine to bring an action against his commanding officer for damages resulting from a detention and flogging. See also *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89 (1849). This Court further distinguished *Dinsman* in *Chappell*, noting that "since the time of *Wilkes*, significant changes have been made establishing a comprehensive system of military justice" (462 U.S. at 305 n.2). See *Trerice* v. *Pedersen*, 769 F.2d 1398, 1403-1404 (9th Cir. 1985). Furthermore, it is unclear from the *Wilkes* decision whether federal or state common law was involved in that case.

769 F.2d 1398, 1403-1404 (9th Cir. 1985); *Trerice* v. *Summons*, 755 F.2d 1081, 1084-1085 (4th Cir. 1985); *Jaffee* v. *United States*, 663 F.2d 1226, 1234-1235 (3d Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982); *Hefley* v. *Textron, Inc.*, 713 F.2d 1487, 1490-1492 (10th Cir. 1983); *Rotko* v. *Abrams*, 338 F. Supp. 46, 48 (D. Conn. 1971), aff'd per curiam, 455 F.2d 992 (2d Cir. 1972). See also *Fountain* v. *United States*, 533 F. Supp. 698, 703 (W.D. Ark. 1981); *Kennedy* v. *Maginnis*, 393 F. Supp. 310, 311-312 (D. Mass. 1975). This immunity rests on the longstanding recognition that a member of the federal armed forces, even more than a civilian federal official (see *Barr* v. *Matteo, supra*), is entitled to immunity from state civil liability for actions taken incident to his service.[3]

A serviceman's immunity from state tort actions protects the same governmental interests implicated in *Feres*, but is analytically distinct and actually predates that case. We believe that the court of appeals spoke somewhat imprecisely in relying on the "*Feres* doctrine" as a bar to state tort suits against individual service members arising incident to service. Regardless of the label, however, petitioner does not dispute the existence of this immunity. The only question he presents is whether respondent National Guard technicians' activities are sufficiently related to military service to permit them to invoke that immunity in this case. See Pet. ii.[4]

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[3] The Ninth Circuit has consistently recognized this immunity for at least 20 years. See *Pedersen*, 769 F.2d at 1403; *Mollnow* v. *Carlton*, 716 F.2d 627, 628 (1983), cert. denied, 465 U.S. 1100 (1984); *Mattos* v. *United States*, 412 F.2d 793, 794 (1969); *Bailey* v. *Van Buskirk*, 345 F.2d 298, 298 (1965), cert. denied, 383 U.S. 948 (1966).

[4] Petitioner does not challenge the court of appeals' conclusion that respondents here were entitled to invoke their immunity from common law suits following trial. See Pet. App. 6a-9a. We note that respondents did move to dismiss this action on federal immunity grounds prior to trial, citing a federal officer's immunity, under *Barr*

2. The court of appeals and the district court correctly concluded that the dispute between the National Guard technicians in this case arose incident to military service and that respondents therefore were immune from civil liability under state law. That factbound determination does not conflict with any decision of this Court or another court of appeals and does not warrant further review.

An Army National Guard technician is a civilian employee of the Army for purposes of applicable wage scales and employment and retirement benefits. But the technician performs an essentially military mission. He is required to be a service member and must hold a military grade specified by the Secretary of the Army for his position (32 U.S.C. 709(b)). He is subject to mandatory removal if he is separated from the service or ceases to hold the military grade specified for his job responsibilities (32 U.S.C. 709(e)(1)). Furthermore, he is not covered by various statutory provisions applicable to the general civil service work force, including provisions governing reduction in work force, removal or adverse action (32 U.S.C. 709(e)(4)-(6) and (f)-(g)). Thus, the courts of appeals have recognized the important military dimension of a National

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v. *Matteo, supra,* from common law suits. See C.R. 6, Memorandum in Support of Motion to Dismiss (filed Mar. 2, 1984), at 4-8. The memorandum in support of the motion to dismiss did not mention *Feres* or cite the court of appeals cases, cited above, that recognize a military service member's closely related (but substantially broader) immunity from common law tort suits. We nevertheless believe that the motion and supporting memorandum sufficiently raised the question of immunity to permit the district court to revisit that question and consider additional authority, involving military service members, following trial. In any event, the question whether respondents' motion to dismiss was timely under these circumstances is not sufficiently important and does not arise with sufficent frequency to warrant this Court's review.

Guard technician's on-the-job activities. See *Martelon* v. *Temple*, 747 F.2d 1348, 1351-1352 (10th Cir. 1984) ("The legislative history of the Act shows that Congress considered that the military mission of the technicians was paramount and that the technician's duties were inseparable from his or her military obligations."), cert. denied, 471 U.S. 1135 (1985); *NeSmith* v. *Fulton*, 615 F.2d 196, 201 (5th Cir. 1980) ("Moreover, one of the express purposes of the National Guard Technicians Act was to 'recognize the *military characteristics* of the National Guard' by requiring civilian technicians to be military members of the National Guard and by providing for their supervision by the adjutants general pursuant to regulations prescribed by the secretary of the relevant military department." (emphasis in original; citation omitted)).

That conclusion is certainly true with respect to the particular technicians in this case. They worked at a military base and were subject to military regulations and a uniformed military chain of command (Pet. App. 9a). Supervisor technicians (and, since 1985, all other technicians) were required to wear their military uniforms while on the job. See C.A. E.R. (Affidavit of Lt. Col. Thomas W. Clark). Their job responsibilities—the repair and maintenance of National Guard vehicles and equipment—were directly associated with military preparedness. And petitioner's specific complaint, alleged harassment by his supervisor and others holding superior rank, is a personnel matter involving service-related conduct and discipline that is subject to review by the base military command. See Pet. App. 9a, 11a, 21a-22a. Given these circumstances, the court of appeals was plainly correct in affirming the district court's factual determination that petitioner's suit arises from the technician's on-base military-related conduct and is therefore incident to military service. See *id.* at 9a-10a & n.8, 21a-22a.

Petitioner incorrectly contends that the court of appeals' decision conflicts with *Brown* v. *United States*, 739 F.2d 362 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985). In that case, an off-duty black National Guardsman was subjected to a mock lynching while attending an unruly Memorial Day weekend picnic held on a military base. He subsequently attempted suicide. The court held that the guardsman's mother could bring an action against the individual participants under 42 U.S.C. 1981 and 1983. But the court specifically noted that the picnic "was not sponsored by the military base nor was it related to the military mission of the base" (739 F.2d at 368) and that the activity at issue was "of a distinctly non-military nature" (*id.* at 369). The court of appeals in this case correctly distinguished *Brown* on two grounds: first, the mock lynching was less connected with on-duty activity and with the command relationship than was the harassment here (Pet. App. 13a n.10); and second, *Brown* was decided before this Court's decision in *Johnson*, which adopted a broader view of the categories of activities that may be viewed as implicating military discipline (*ibid.*). There is, in short, no direct conflict between this case and *Brown* requiring resolution by this Court.

Petitioner also points to other cases permitting, in certain circumstances, National Guard technicians to maintain actions under 42 U.S.C. 1983 for alleged constitutional violations (Pet. 21). These cases do not, however, conflict with the decision in this case, which involves an action grounded in state law. In any event, most courts have refused to permit such National Guard technicians to bring suits based on alleged constitutional violations owing to the military status of the Guard technicians. See, *e.g.*, *Jorden* v. *National Guard Bureau*, 799 F.2d 99, 104-108 (3d Cir. 1986), cert. denied, No. 86-1382 (Oct. 5, 1987); *NeSmith* v. *Fulton*, 615 F.2d 196, 201-203 (5th Cir. 1980).

Moreover, those cases cited by petitioner as permitting Section 1983 actions were, with one inconsequential exception,[5] decided prior to this Court's decision in *Chappell* barring constitutional damages suits within the military, and therefore must be viewed as questionable authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JULY 1988

[5] The exception is *Johnson* v. *Orr*, 780 F.2d 386 (3d Cir.), cert. denied, 479 U.S. 828 (1986). *Orr*, however, does not assist petitioner. There the court held only that the hybrid federal/state nature of the Guard does not prevent the Guardsmen from acting under color of state law so as to meet the jurisdictional threshold of a Section 1983 action. The court made no ruling on the reviewability of the specific actions involved. Several months later, in *Jorden* v. *National Guard Bureau, supra*, the same court of appeals held that a Guard technician, like the enlisted military personnel discussed in *Chappell*, could not bring suit for damages against superior officers for military-related injuries, under 42 U.S.C. 1983, or common law causes of action. 799 F.2d at 104-108 & n.12.

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